Supreme Court, U.S.
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No. 85-2067

In The

Supreme Court of the United States

October Term, 1985

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSE MENDOZA-LOPEZ AND
ANGEL LANDEROS-QUINONES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant prosecuted under 8 U.S.C. 1326 for reentering the United States after having been deported may collaterally attack the validity of his deportation proceeding to show that the deportation order was not entered in accordance with the law.

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The attorney for the defendants/respondents respectfully requests that the writ of certiorari sought in this case be denied.

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STATEMENT

1. Both defendants were apprehended in Lincoln, Neb. on October 23, 1984, by U.S. Immigration and Naturalization Service agents (INS agents). The defendants were processed in Omaha, Neb., some 60 miles from Lincoln. After processing, they were flown 500 miles to Denver, Col. for detention prior to deportation proceedings. In a joint hearing on October 30, 1984, defendants and eleven other Mexicans were found deportable. None of the respondents were represented by counsel. At the hearing, both defendants requested that the Immigration Law Judge (ILJ) provide relief from the deportation order. Such relief was premised on the fact that each had continuously resided in the United States for more than seven years and had no prior criminal record. Their requests were not acted upon. Defendants were bussed to El Paso, Texas, and escorted across the border on Nov. 1, 1984.

2. On December 12, 1984, both defendants were arrested in Lincoln, Neb. They were indicted by the grand jury sitting in the District for Nebraska on charges of violating 8 U.S.C. § 1326.

On Feb. 7, 1985, defendants timely filed pretrial motions requesting pretrial judicial review of their deportation proceedings, and dismissal of the indictments against them. Alternatively, defendants moved to suppress and

exclude all evidence relative to the deportation orders of Oct. 30, 1984. On Feb. 22, 1985, the U.S. District Court for the District of Nebraska dismissed the indictments.

The memorandum opinion (found in petitioner's appendix, pages 8a-26a, and hereinafter referred to as pet. app.) supporting the dismissal order found that pretrial judicial review was available to challenge a prior administrative order that represented a material element of a criminal charge. The court noted the strong dissent by Justices Jackson and Frankfurter in *U.S. v. Spector*, 343 U.S. 169 (1952), which stated that an alien "[s]tands on equal constitutional footing with the citizen when he is charged with crime. If Congress can subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen." *Spector*, supra, at 178. The district court also found persuasive the reasoning of the Third, Seventh and Ninth Circuits that allowed collateral attacks on deportation orders. Pet. App. at 18a. These circuits require that a governmental action be done according to law to be valid. They further state that, for the purposes of 8 U.S.C. § 1326, a deportation must be "a lawful deportation." *U.S. v. Gaska-Kraft*, 522 F.2d 149. 152 (9th Cir. 1975). See also *U.S. v. Bowles*, 331 F.2d 742 (3rd Cir. 1964); *U.S. v. Rosal-Aguilar*, 652 F.2d 721, 723 (7th Cir. 1981).

The district court then found that, after reviewing defendants' deportation proceedings, it was "left with the distinct impression that substantial justice was not done" Pet. App. at 26a. In a detailed factual finding, Judge Urbom stated that the defendants had been denied due process by the ILJ's failure to provide a hearing that was

fundamentally fair. It was "inconceivable that they [the defendants] would so lightly waive their rights to appeal, and thus to the relief they now claim entitlement, if they had been fully apprised of the ramifications of such a choice." Pet. App. at 23a. The swift expulsion of the defendants from this country following their hearing barred any further appeals, even though they were still well within the ten days allowed to appeal the administrative order. Expulsion also interrupted "their prior continuous stay in the United States so as to make them seemingly now ineligible for suspension of deportation." Pet. App. at 24a.

3. The court of appeals affirmed, stating that "[A]llowing a pretrial review of the underlying deportation to examine whether due process was provided ensures fundamental fairness to the rights of the criminal defendant." *United States v. Mendoza-Lopez*, 781 F.2d 111, (8th Cir. 1985). The opinion specifically found that *Lewis v. United States*, 445 U.S. 55 (1980) was inapplicable to the facts at hand. The prior decision in Lewis which that defendant sought to collaterally attack was judicial, not administrative. The court of appeals further found that the district court had correctly ruled that the ILJ did not clearly or adequately inform the defendants of the consequences of the choices they were forced into making. A dissent was entered by Judge Fagg, stating his belief that 8 U.S.C. § 1105a provides the "sole and exclusive" method for obtaining judicial review of deportation orders.

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ARGUMENT

The lower courts were correct in allowing pretrial scrutiny of the administrative deportation order and in finding the defendants were materially harmed by due process violations in their deportations. Judicial review of the proceedings underlying the order of deportation provides for a proper balancing of individual and governmental interests. It provides the least intrusive forum for protecting these interests, while preserving the constitutional integrity of the § 1326 proceedings. A material element of an offense punishable by incarceration should not be established without the protections of criminal due process and a jury trial. *U.S. v. Spector*, 343 U.S. 169, 178 (1952) (Jackson J., dissenting.)

The petitioner's argument, that collateral review should be denied to allow simple and convenient prosecutions, is supported by no legal authority. The 1,185 prosecutions under § 1326 should be looked at in the context of the total number of aliens expelled by INS. The 1984 INS Statistical Yearbook states that 1,379,000 aliens were expelled that year. Of that number, only 20,000 were formally deported. Of the total number expelled, 331,000 had been previously deported or forced to leave.

1. Collateral review does not weaken the function of § 1326. At least two prosecutions have succeeded under § 1326 in Nebraska alone since the district court ruling in February 1985. The facts in this case are unique; if similar situations should arise, collateral atack should and must be available to prevent a grave injustice. It is inequitable to exempt civil deportation hearings from the strict due process requirements of criminal prosecutions and then permit the government to "turn around and use the result

as a conclusive determination of [deportability] in a criminal proceeding." *Spector* at 179.

The lower courts' decisions are limited in scope, and correct in their application; the rulings should not be disturbed.

2. An administrative ruling should not be allowed to supercede the right of the jury to determine all elements of a criminal offense. In *Estep v. U.S.*, 327 U.S. 114 (1946), this Court held that the validity of an administrative order could be reviewed when the order became the foundation for a criminal charge. To deny such a review would be to deny the defendant the opportunity to prove the nonexistence of an essential element of the crime with which he was charged. See also *McGee v. U.S.*, 402 U.S. 479 (1971).

3. Petitioners argue that *Lewis* established the proposition that the underlying validity of a prior conviction is irrelevant. This theory fails on two counts. First, a prior felony conviction is entered in accordance with all the protections of due process afforded a criminal defendant under the constitution. A deportation is civil in nature, with virtually no protections for the alien and a much lower standard of proof. 8 C.F.R. § 242.14 (1985). Secondly, as the district court found. the policies behind the respective statutes are totally disparate. Pet. App. at 17a.

4. The petitioners incorrectly suggest that *Yakus v. U.S.*, 321 U.S. 414 (1944) is analagous to the facts at hand. *Yakus* involved an exercise of rule making power, not the adjudicative powers of the INS. Therefore, a different scope of review is involved. *Yakus*-type determinations are

akin to delegated legislative authority, and are subject only to an examination for constitutionality. A deportation hearing is measured against procedural safeguards for the equitable treatment of individuals.

5. Finally, petitioners state that the language of the Immigration and Nationalization Act prohibits collateral attacks in § 1326 prosecutions. An analysis of 8 U.S.C. § 1105a and its scant legislative history, however, yields little support for this proposition. The Congressional record does not show that § 1326 prosecutions were considered at all, although it is clear that Congress was concerned with protecting the due process rights of aliens subject to deportation proceedings. H.R. Rep. No. 1086 at 17-19, *reprinted* in 1961 U.S. CODE CONG. & AD NEWS at 2972-73. Furthermore, § 1105a is the civil deportation review statute, and applies only to aliens still empowered to raise civil attacks by their continuing presence in the United States.

The facts of this case clearly illustrate why collateral review is essential. The defendants are barred from any civil judicial review of their deportation order. Their right to an administrative appeal ended when they crossed the border into Mexico. The underlying deportation was entered in violation of their rights to due process. Collateral attack must be available to allow a full hearing on the issues in a criminal action predicated on a constitutionally invalid deportation order.

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CONCLUSION

The lower courts' rulings are correct and appropriate. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney for the Respondents